

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE TELLO,

Defendant-Appellant.

UNPUBLISHED

November 28, 2000

No. 219312

Saginaw Circuit Court

LC No. 97-014653-FC

Before: Doctoroff, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions of four counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant received four concurrent terms of imprisonment of twenty to forty years for the CSC I convictions and one concurrent term of ten to fifteen years' imprisonment for the CSC II conviction. We affirm.

Defendant first argues that the prosecutor committed various acts of misconduct during closing argument that had the effect of shifting the burden of proof to defendant, denigrating the defense, and improperly appealing to the jury's sympathy for the complainant. Defendant did not object to any of the prosecutor's remarks, so this issue is unpreserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Because this issue is unpreserved, this Court will only review for plain error. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Three requirements must be met to withstand forfeiture under the plain error rule: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines*, *supra* at 763.

Defendant first calls this Court's attention to the following passage from the prosecutor's closing argument as evidence of burden shifting:

No adequate answer was provided by the defendant to these charges other than I didn't do it. He has no burden to prove anything. The People have the burden of proof throughout an entire trial. Even now as you go into the jury deliberation room, after his testimony has been received [sic] by him and his other

witnesses, we still have the burden of proof, and you shouldn't never [sic] think that the defendant has to prove anything.

"Due process entitles an accused to the presumption of innocence, while the prosecution carries the burden of proving guilt beyond a reasonable doubt." *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), disapproved on other grounds *People v Fields*, 450 Mich 94, 115 n 24; 538 NW2d 356 (1995). A prosecutor may not suggest in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof. *Foster, supra*. In the present case, the prosecution clearly explained its burden of proof and argued a reasonable inference based on the evidence presented at trial, which is proper. *People v Messenger*, 221 Mich App 171, 180-181; 561 NW2d 463 (1997). Thus, we conclude no plain error ensued from the cited portion of the prosecutor's argument.

Defendant next contends that the prosecutor denigrated his defense as "pathetic." The remark came at the end of a lengthy argument by the prosecution that the likelihood of defendant's DNA matching anyone else's was "astronomical." The prosecutor was merely arguing that defendant's testimony was implausible. A prosecutor is not required to phrase arguments or state inferences in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). We therefore find no plain error.

Further, defendant argues that more denigrating remarks occurred when the prosecutor told the jury:

I know you wish you didn't have to be here. We all do. And that he could just say all right, I did this. But he isn't. He's plead [sic] not guilty, and he swore under oath he didn't [sic]. So deal with the evidence. He's trying to deal with the evidence over and over again by constantly pushing it away and saying it's not me, it's Robin. But the DNA matches.

Defendant claims that the prosecution improperly turned the jury against him by stating that, but for a guilty plea, the jurors would be free of their trial duties. No error occurred because the prosecutor did not suggest that defendant pleaded not guilty when in fact he was guilty. Instead, he noted that defendant pleaded not guilty "under oath," and that the jurors would have to contend with the evidence. The prosecutor's tactics were not improper because he was not distracting or confusing the jury by injecting issues broader than the guilt of the accused. He was instead arguing the evidence. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999).

Defendant further asserts that the prosecutor made more denigrating comments when he argued that the jurors could not base their decision wholly on the fact that defendant said he did not commit the crime. No plain error resulted from the comment because it fairly represented the jurors' duties. The prosecutor explained that juries reach guilty verdicts all the time "if the evidence is there" and not guilty verdicts when reasonable doubt exists. The prosecutor committed no misconduct, but merely explained how the jury was to go about weighing the evidence.

Defendant argues that from the outset of trial, the prosecution's remarks were intended to evoke sympathy for the complainant and for her family. The prosecutor's questions during voir dire regarding the nature of the crime and its effect on the jury's ability to decide the case were proper. *People v Tyburski*, 445 Mich 606, 618 (Mallett, J.); 518 NW2d 441 (1994). Further, it was not improper for the prosecutor to state in his opening statement that the crime was "despicable." See *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994).

Defendant next contends that a series of prosecution arguments commenting on the lack of freedom that children have as compared to adults, and particularly stressing the constraints complainant suffered because of her own personal situation, was an improper emotional appeal for sympathy. Immediately after a protracted discussion of the hardships faced by the complainant, who was attending special education classes, the prosecutor began to discuss the complainant's better attributes:

The first blessing I think you can see she has is she has courage. Second, she is capable of getting through the times when adults aren't showing her any love or concern by communicating about things that have hurt her without letting the terror or memories overwhelm her. *Third, she seems to be a genuinely loving child and she hasn't given up on the adults in the world or abandoned her belief that by telling us how this man hurt her, you will do the right thing about the atrocious crimes he committed on her.* [Emphasis added.]

A prosecutor may not appeal to the jury to sympathize with the victim. *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). Here, the prosecutor's remarks appear to be a blatant appeal for sympathy toward the complainant. See *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). The prosecutor did not merely argue that the complainant was entitled to equal protection of the law. See *Hoffman*, *supra* at 21-22. Instead, the prosecutor's remarks created sympathy for the complainant and were so emotionally charged that a jury would tend to disregard the evidence. We therefore conclude that admission of the prosecutor's remarks constituted plain error.

Reversal for prosecutorial misconduct is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Carines*, *supra* at 763. The defendant bears the burden of demonstrating that such an error resulted in a miscarriage of justice. *People v Brownridge (On Remand)*, 237 Mich App 210, 216; 602 NW2d 584 (1999); see, also, *Carines*, *supra* at 774. Here, a specialist in molecular biology testified that defendant's DNA was a six-probe match of that found on the complainant's underwear. He further testified that the probability of a random member of the population matching on six-probes is 1 in 26.2 billion in the Caucasian population, 1 in 308 billion in the African-American population, and 1 in 43.6 billion in the Hispanic population. There was also evidence of defendant's semen in the complainant's vagina and rectum. An expert in emergency medicine testified that the complainant had redness in her vaginal area caused by trauma or rubbing and that her rectum was everted and cracked, both of which could have been caused by penile penetration. In light of this evidence, we believe that the prosecutorial misconduct could not have overcome the plain error rule's third requirement that the error had been outcome determinative. *Carines*, *supra* at 763.

Defendant next asserts that the prosecutor committed error requiring reversal when during closing argument, he told the jury to think “how stupid you will feel . . . five years from now or at the end of your life or a week from now, [if] you actually concluded after deliberating, that [defendant] was not guilty.” He then stated that the evidence proved his argument. Defendant argues that these remarks improperly shifted the jurors’ minds from the proofs to their emotions and conscience. We, however, conclude that the argument was properly based on the evidence. See *Hoffman, supra*. A prosecutor need not phrase arguments or state inferences to be drawn from the evidence in the blandest possible terms. *Ullah, supra*. Further, as discussed, if this were prosecutorial misconduct, any error was not outcome determinative in light of the forensic evidence identifying as defendant’s the semen found in the complainant’s vagina, rectum, and underwear.

Defendant also argues that his sentence was disproportionate to the offense. Matters of sentencing are reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). An abuse of discretion exists when the court imposes a sentence that is disproportionate to the seriousness of the crime and the situation of the defendant. *Id.* Defendant received a minimum sentence of twenty years (240 months) for the CSC I convictions. The recommended guidelines’ sentencing range was 180 months to 360 months or life. Thus, his sentence was within the guidelines. Sentences that fall within the guidelines’ range are presumed to be neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000). Nevertheless, a sentence within a guidelines’ range can conceivably violate the principle of proportionality in unusual circumstances. *Milbourn, supra* at 661. We concur with the trial court that defendant’s exploitation of a ten-year-old child and the multiple penetrations involved make this sentence proportionate to the seriousness of this offense and the manner in which it was committed. *People v McElhaney*, 215 Mich App 269, 285-286; 545 NW2d 18 (1996). With respect to defendant’s assertion that his maximum sentence is disproportionate, we disagree. The sentence was authorized by the Legislature and was proportionate to the offense and offender under *Milbourn, supra* at 636. See MCL 750.520b(2); MSA 28.788(2)(2) (CSC I is punishable by life or any term of years); *People v Lemons*, 454 Mich 234, 258, 260; 562 NW2d 447 (1997).

Defendant further argues that this Court should consider the scoring that would inure under the new statutory sentencing guidelines. Because this crime occurred before to January 1, 1999, this Court is under no obligation to consider the new statutory guidelines. *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000). Defendant next argues that he should not have received a score of fifty points for OV 12, two or more sexual penetrations. Scoring of the guidelines presents a cognizable claim only if the factual predicate is wholly unsupported, the factual predicate is materially false, and the sentence is disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997); *People v Cain*, 238 Mich App 95, 131; 605 NW2d 28 (1999). Because review is not available for claims of scoring errors or errors of misinterpretation, we decline to address defendant’s claim. *Mitchell, supra* at 176. We thus

conclude that the trial court did not abuse its discretion when it sentenced defendant because the sentence was proportionate to the seriousness of the crime.

We affirm.

/s/ Martin M. Doctoroff

/s/ Joel P. Hoekstra

/s/ Jane E. Markey